IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITON NO.6579 OF 2006

M/s.Polymermann (Asia) Pvt. Ltd. ..Petitioner.

V/s.

The Union of India & Anr. ..Respondents.

Mr.Rafiq Peer Mohideen for petitioner.

Mr.Vinay Sonpal,A.G.P. for respondent No.1.

Mr.H.V.Mehta for respondent No.2.

CORAM : H.L.GOKHALE AND
J.P.DEVADHAR, JJ.

DATED : 1ST DECEMBER, 2006.

P.C. :-

Heard Mr.Mohideen in support of this petition. Mr.Sonpal appears for respondent No.1 and Mr.Mehta appears for respondent No.2.

2. The first petitioner is a Company incorporated under the Companies Act and petitioner Nos.2 & 3 are its Directors. The respondent No.1 has served a notice on the 1st petitioner dated 22nd December, 2005 calling upon the Company to clear the sales tax dues to the tune of Rs.16,59,922/- on or before 25th September, 2006, failing which they will be prosecuted appropriately. The notice further informs the 1st petitioner that it is advisable to obtain a

stay order for non prosecution under sections 405, 406 & 409 of Indian Penal Code to avoid issuance of warrant and subsequent arrest. It is, therefore, that the 2nd and 3rd petitioners, who are directors of the 1st petitioner have been joined in this petition to challenge this notice dated 22nd December, 2005 and prosecution. This is prayer (a) of the petition.

3. Prayer (b) of the petition is not to initiate any proceeding or action towards the recovery of the alleged sales tax dues. As far as prayer clause (b) is concerned, Mr.Mohideen, learned counsel for the petitioners submits that the Company is declared sick and, therefore, no further steps be taken. Now, as far as the Civil liability is concerned, right now nothing is disclosed in the petition as to what actions are proposed by the respondents. As far as the threat to prosecute in the notice dated 22/12/2005 is concerned, in our view, it will be open to the petitioners to raise a defence before the appropriate Court as and when they are prosecuted. We may as well refer to the decision of the Apex Court in the case of **Kusum Ingots & Alloys Ltd. V/s. Pennar Peterson Securities Ltd. & Ors.** reported in **(2000) 2 Supreme Court Cases, 745** wherein in a case under the Negotiable Instruments Act, the Apex Court has observed that if the ingredients of Section 138 are satisfied, section 22 or 25 of the Sick

Industrial Companies Act will not bar criminal proceedings against the company and its directors. This being the position, it will be open to the petitioner Nos.2 & 3 to raise their defence as and when they are prosecuted. We do not deem it fit to entertain this petition.

4. We may add that whether a criminal liability arises from non payment of sales tax recovered by the assessee is an aspect which can be gone into by the concerned Criminal Court when the petitioners raise their defence. A forum is available to the assessee. Hence we decline to accept the petition.

4. Petition is dismissed.

(H.L.GOKHALE, J.)

(J.P.DEVADHAR, J.)